Supreme Court
FILE
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No. 89-637

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RAYMOND PROZZILLO, JESS BOROWSKI, BETTY GILL, JOHN CARSON AND MARION COUNTY, WEST VIRGINIA,
Petitioners,

v.

AMERICAN STATES INSURANCE COMPANY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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STATUTES

Internal Revenue Code of 1954, (26 U.S.C.), as amended by Pub. L. 100-647 (TAMRA):	
§ 6332(e)	4

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PRELIMINARY STATEMENT

The Respondent, in its brief in opposition, raises an issue not covered in the petition for writ of certiorari, and has, in addition, misconstrued the Petitioners' arguments, thus requiring additional comment to aid the Court in its determination.

ARGUMENTS

1. The Fourth Circuit Considered The Issue Now Raised In The Petition For A Writ Of Certiorari Notwithstanding Respondent's Objection, Thus Curing Any Jurisdictional Defects.

In Petitioners' appeal to the Fourth Circuit, the issue as to liability to Respondent for honoring the Internal Revenue Service levy was squarely raised and thoroughly briefed by both sides. The Petitioners' brief, at pages 8 and 9 quoted at length from *United States* v. *National Bank of Commerce*, 472 U.S. 713 (1985), setting forth the principle that the statutory remedies for wrongful levy precluded exposing the stakeholder to double liability were it to honor the Internal Revenue Service levy.

Notwithstanding Respondent's objection to its jurisdiction to entertain the appeal for Petitioners' failure to assert any defenses at the trial, the Fourth Circuit did in fact consider this issue on its merits. This is clearly indicated by the main portions of the Fourth Circuit's Memorandum Opinion:

> Marion County admitted the facts. It made no claim that it was entitled to pay itself the $3,000, but it did insist that it was entitled to deduct the amount it had paid to the Internal Revenue Service. It treated the claim of the insurance company as no more than a competing claim upon the fund. It took the position that it had no defense to the claim of the United States. In doing so it completely ignored the assignment of the construction company to the insurance company of all the construction company's interest in the funds withheld by Marion County.
>
> There is no merit in the county's appeal. Summary judgment for the plaintiff was properly entered. The county knew of the assignment by the construction company to the insurance company and had no right

> to treat the retained funds as property of the construction company subject to its command and to the levy of the United States. (Opinion of the Fourth Circuit Court of Appeals, Petitioners' Appendix, at Page A3).

In *Singleton* v. *Wulff*, 428 U.S. 106 (1976), this Court stated that "[t]he matter of what questions may be taken up and resolved for the first time on appeal *is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.*" Where the court of appeals exercises such discretion and considers the newly raised issues on the merits, its decision to do so will not be disturbed by this Court if the objecting party did not contend that the record was inadequate for such consideration. See *Sabbath* v. *United States*, 391 U.S. 585, 588, fn. 11 (1968).

In the instant case, the issue raised is one of law. The Respondent has made no contention herein that it would have introduced additional evidence had this defense been raised at the trial level. Moreover, it also failed, before the Fourth Circuit, to demonstrate in what manner it was being prejudiced. It thus was unable to convince the court of appeals to summarily dismiss the appeal on the general rule that federal appellate courts will not consider an issue not passed upon below.

Accordingly, it is clear that the Fourth Circuit did consider the issue petitioned, and that the Respondent has failed to demonstrate the court abused its discretion in doing so. The asserted jurisdictional defect has thus been cured and the case is ripe for consideration on the merits.

2. The Petitioners Are Not Attempting To Relitigate The Question Of Whether Respondent Was The True Owner Of The Funds Paid To The Internal Revenue Service.

The Respondent, throughout its Brief in Opposition, asserts that Petitioners are seeking to have this Court

review the question of ownership of the funds paid to the Internal Revenue Service. On the contrary, the issue raised by the Petitioners assumes that ownership of the funds paid to the Internal Revenue Service will, as in the instant case, ultimately be determined to be that of a third party, not the taxpayer. Indeed, where the funds are determined to be those of the taxpayer, i.e., subject to levy, section 6332(e), effective for levies issued on or after July 1, 1989, now provides for a discharge from liability to any person upon payment to the Internal Revenue Service.

The Petitioners are requesting this Court to review the decision of the court below for the purpose of establishing a rule to protect a stakeholder who pays the Internal Revenue Service pursuant to a levy *before ownership is established*. The Petitioners in this case and thousands of others similarly situated cannot, because of the legal and factual complexities of ownership determination, reasonably make that decision without substantial risk or protracted litigation.

For obvious policy reasons, the discharge of liability to third parties is needed to insure prompt payment of the tax liabilities in these disputed ownership situations. Although section 6332(e) fails to address the instant situation, it does not preclude a judicially established rule exonerating the stakeholder from liability. Cf. *United Pacific Insurance Company* v. *Laurel County*, 805 F.2d 628, 635, fn. 9 (6th Cir. 1986), *cert. denied*, ___ U.S. ___, 108 S. Ct. 72 (1987).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 29th, 1989, three copies of Petitioners' Reply to the Respondent's Brief in Opposition were mailed, postage prepaid, to E. Joel Wesp, Esq., Wesp & Osterdamp, A Legal Professional Association, 50 West Broad Street, Suite 3300, Columbus, Ohio 43215, Counsel for Respondent.

I further certify that all parties required to be served have been served.

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